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Nos. 05-1382, 05-380

In the

Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, ET AL.,
Respondents.

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

LEROY CARHART, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE NINTH AND EIGHTH CIRCUITS

BRIEF OF *AMICI CURIAE* FORMER FEDERAL PROSECUTORS IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*[1]

Zachary W. Carter, former United States Attorney for the Eastern District of New York; Kendall Coffey, former United States Attorney for the Southern District of Florida; James E. Johnson, former Assistant United States Attorney and Deputy Chief of the Criminal Division for the Southern District of New York; Scott R. Lassar, former United States Attorney for the Northern District of Illinois; Laurie L. Levenson, former Assistant United States Attorney for the Central District of California; Loretta Lynch, former United States Attorney for the Eastern District of New York; Denise E. O'Donnell, former United States Attorney for the Western District of New York; Kristine Olson, former United States Attorney for the District of Oregon; Mark F. Pomerantz, former Assistant United States Attorney and Chief of the Criminal Division of the United States Attorney's Office for the Southern District of New York; William W. Robertson, former United States Attorney for the District of New Jersey; and James Robinson, former United

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[1] All parties in the matter *Gonzales* v. *Planned Parenthood, et al.*, No. 05-1382, and in the matter *Gonzales* v. *Carhart, et al.*, No. 05-380, have consented to the filing of this *Amici Curiae* brief, as evidenced by letters of consent filed with the Clerk. *Amici* are filing an Motion for Leave to File A Brief Of *Amici Curiae* Former Federal Prosecutors In Support of Respondents in *Gonzales* v. *Carhart, et al.*, No. 05-380. *Amici* are not related in any way to any party in this case, and no party or its counsel has authored any part of this brief. No person or entity other than *Amici* and their counsel has made any monetary contribution to the preparation of this brief.

States Attorney for the Eastern District of Michigan, are former federal prosecutors who have an interest in the effective functioning of the criminal justice system.

Amici are concerned that the unconstitutionally broad scope and vagueness of the Federal Partial-Birth Abortion Ban Act of 2003 threaten the criminal justice system by undermining the public's faith in the fairness of the system and the impartiality of prosecutors. Further, *Amici* are concerned that the Federal Abortion Ban puts prosecutors in the untenable position of prosecuting a law that directly conflicts with their traditional role to protect public health and safety, particularly where the medical profession disagrees on the necessity for certain procedures and the Ban was enacted in a highly-charged political environment. For these reasons, as explained further below, *Amici* urge the Court to affirm the decisions below.

STATEMENT OF THE CASE

Amici adopt Respondents' Statement in this case and Respondents' Statement in *Gonzales* v. *Carhart* and note the following facts relevant to the legal discussion in this brief.

The Federal Partial-Birth Abortion Ban Act (the "Federal Abortion Ban" or "Ban") was enacted in 2003, in response to this Court's decision in *Stenberg* v. *Carhart* declaring a Nebraska "partial-birth" abortion statute unconstitutional. The Ban seeks to outlaw abortion procedures referred to vaguely as "partial-birth abortions" and, like the unconstitutional Nebraska law, the Ban lacks any exception for the health of the woman. Any physician who violates the Ban may be imprisoned for up to two years and faces civil liability.

Every court to consider the Federal Abortion Ban has found it to be unconstitutional. The findings made by three district courts and the opinions of three appellate courts declaring the Ban unconstitutional confirm not only a widespread belief among physicians that the prohibited procedures are sometimes the best means to preserve a woman's health, but also that the Ban is unconstitutionally vague and overbroad and imposes an undue burden on a woman's constitutional right to choose to have a previability abortion. Moreover, the Ban fails to provide fair warning to those it regulates, prohibits the use of most second trimester abortion procedures, and threatens to chill the use of other necessary, and constitutionally protected, reproductive health services.

After carefully considering the evidence, the District Court for the Northern District of California held that the Ban is inconsistent with this Court's precedent and unconstitutional. The district court below first held that the Ban is facially invalid under *Stenberg*, for failing to include a health exception. Further, after hearing the testimony of numerous physicians and considering hundreds of exhibits, the district court concluded that the Ban's definition of "partial-birth abortion" encompasses not only intact D&E abortions but also non-intact D&Es,[2] certain inductions, and the treatment of some spontaneous

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[2] As defined by the Ninth Circuit, a non-intact D&E is a method of performing an abortion in which a doctor first dilates a woman's cervix and then, under ultrasound guidance, grasps a fetal extremity with forceps and attempts to bring the fetus through the cervix. In an intact D&E, also referred to as a D&X, the doctor first will dilate the woman's cervix. Rather than using multiple passes to disarticulate and remove the fetus, the doctor removes the fetus in one pass, without any disarticulation. *See Planned Parenthood Fed'n of Am.* v. *Gonzales*, 435 F.3d 1163, 1167 (9th Cir. 2006). The D&E procedures account for 85 to 95 percent of post-first trimester abortions. *Id.* at 1166.

miscarriages. *Planned Parenthood Fed'n of Am.* v. *Ashcroft*, 320 F. Supp. 2d 957, 973-74 (N.D. Cal. 2004). As a result, the court found the statute's language overbroad, thereby imposing an undue burden on women because physicians face prosecution and imprisonment for performing almost *any* second trimester abortion procedure. *Id.* at 974. The court also found the Ban unconstitutionally vague because, as physicians' trial testimony confirmed, the terms employed in the Ban do not clearly define the prohibited medical procedures; the Ban therefore deprives physicians of the fair notice that would enable them to conform their conduct to the law, and encourages arbitrary enforcement. *Id.* at 976-78.

The Ninth Circuit affirmed the district court's findings of overbreadth and vagueness. The court of appeals found that Congress, in drafting the Ban, deliberately chose not to follow this Court's precedent and instead defined the prohibited procedure to include most second trimester abortion procedures. *Planned Parenthood Fed'n of Am.* v. *Gonzales*, 435 F.3d 1163, 1177 (9th Cir. 2006). Further, because of its overbroad compass, the Ban has a chilling effect on doctors performing any previability second trimester abortion, and the Ban's scienter requirements do not cure this constitutional infirmity. *Id.* at 1177-79. The Ninth Circuit also found the Ban unconstitutionally vague "[b]ecause neither the statute when read as a whole nor its individual components provide fair warning of the prohibited conduct to those it regulates and because the Act permits arbitrary and discriminatory enforcement." *Id.* at 1184. Finally, because Congress deliberately drafted the Ban to be broader than the permissible statute outlined in *Stenberg*, the court of appeals found that the narrowest possible remedy was to permanently enjoin enforcement of the Ban in its entirety. *Id.* at 1191.

The courts in the Eighth and Second Circuits to consider the Ban likewise have enjoined enforcement of the Ban. The United States District Court for the District of Nebraska found the Federal Ban unconstitutional for two distinct reasons. First, the court found that an intact D&E is sometimes the safest abortion procedure to preserve the health of women and that Congress' finding to the contrary was not supported by competent medical evidence. *Carhart* v. *Ashcroft*, 331 F. Supp. 2d 805, 1017 (D. Neb. 2004). That same court made the same findings when considering Nebraska's "partial-birth" abortion ban in *Stenberg*—findings that this Court found to be "highly plausible" and "record based." *Id.* at 1017 n.147; *Stenberg* v. *Carhart*, 530 U.S. 914, 936 (2002). Second, the court found that the law applies to some non-intact D&E procedures as well as intact D&Es and is thus unconstitutionally overbroad. *Carhart* v. *Ashcroft*, 331 F. Supp. 2d at 1030-37.[3]

The Eighth Circuit affirmed. Finding that substantial medical authority supports the proposition that intact D&Es are sometimes necessary to protect a woman's health, the court found the Ban unconstitutional for its lack of a health exception. *Carhart* v. *Gonzales*, 413 F.3d 791, 802 (8th Cir. 2005). Because this alone invalidated the Ban, the court did not reach the issues of undue burden or vagueness. *Id.* at 803-04.

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[3] While the court suggested that the Government's "specific intent" construction might save the Ban from being unconstitutionally vague, it noted, as did the Ninth Circuit, that Congress had "stubbornly refused to follow the Supreme Court's suggestions for clarity" and that it would not be surprised to be overturned on this point because if the Government's construction were improper then "the Act is hopelessly vague regarding the medical procedures to which it applies." *Carhart* v. *Ashcroft*, 331 F. Supp. 2d at 1037.

Both the United States District Court for the Southern District of New York and the United States Court of Appeals for the Second Circuit also found the Ban unconstitutional for lack of a health exception. Each court noted that the evidence Congress considered belies its own conclusions: the congressional record demonstrates that a significant body of medical opinion holds that the intact D&E procedure is sometimes necessary to safeguard a woman's health. *Nat'l Abortion Fed'n* v. *Gonzales*, 437 F.3d 278, 287 (2d Cir. 2006); *Nat'l Abortion Fed'n* v. *Ashcroft*, 330 F. Supp. 2d 436, 489 (S.D.N.Y. 2004).

This Court granted certiorari in the present case and in *Gonzales* v. *Carhart* to consider the constitutionality of the Federal Abortion Ban. For the reasons set forth below, the decisions of both the Ninth Circuit and the Eighth Circuit should be affirmed and the Ban held unconstitutional.

SUMMARY OF ARGUMENT

The Federal Abortion Ban is unconstitutionally vague and overbroad and poses a significant threat to the effective functioning of the criminal justice system. The Ban is vague because it fails to provide adequate notice of what procedures it covers, and it is unconstitutionally overbroad because it encompasses within its broad scope most second trimester abortion procedures. The natural consequence of the statute's vagueness and overbreadth is to deter medical professionals from performing necessary medical procedures, even when such action is constitutionally protected and in the best interests of their patients. Where, as here, doctors are forced to choose between criminal liability and the best interests of their patients, it can only be assumed that enforcement of such a law will discourage doctors from performing any type of second trimester abortion procedure at all. This is true even where the

abortion procedure is constitutionally protected under this Court's precedents in *Roe* and *Casey*, and even when it is necessary to protect the health, and indeed the life, of the patient.

But the Ban threatens not only the due process rights of medical professionals and the health of their patients; it threatens the integrity of the criminal justice system. In order to function effectively, the criminal justice system must be correctly perceived by the public to operate fairly and judiciously. A vague and overbroad criminal law such as the Federal Abortion Ban, however, threatens the system by permitting arbitrary and discriminatory enforcement, particularly where, as here, its enactment was politically motivated and highly charged. This backdrop creates the unfortunate image in the public's eye that some prosecutors may enforce this law in accordance with their own personal political views, and undermines the independence of prosecutors. The Ban is unconstitutional and the Court accordingly should affirm the decisions below.

ARGUMENT

I.

THE FEDERAL ABORTION BAN IS UNCONSTITUTIONALLY VAGUE AND THREATENS THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

The Ban is unconstitutional for lack of due process because it does not provide sufficient specificity to "enable the ordinary citizen to conform his or her conduct to the law," *City of Chicago* v. *Morales*, 527 U.S. 41, 58 (1999); *see also Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972);

Lanzetta v. *New Jersey*, 306 U.S. 451, 453 (1939); *Connally* v. *Gen. Constr. Co.*, 269 U.S. 385, 393 (1926), nor does it "provide explicit standards for those who apply them." *Grayned*, 408 U.S. at 108. The degree of specificity required is greater where, as here, the statute imposes criminal sanctions. *See Vill. of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99 (1982); *see also Colautti* v. *Franklin*, 439 U.S. 379, 390 (1979), *overruled in part on other grounds*. Moreover, where statutes permit multiple interpretations, they delegate "basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis," denying citizens the notice required by the Fifth Amendment, and permitting arbitrary and discriminatory enforcement. *Grayned*, 408 U.S. at 108-09. That is this case.

A. The Federal Abortion Ban Is Unconstitutionally Vague Because It Fails to Clearly Define the Medical Procedures That It Prohibits

The Federal Abortion Ban is unconstitutionally vague because, as the court of appeals correctly found, the Ban "fails to define clearly the medical procedures it prohibits." *Planned Parenthood Fed'n of Am.* v. *Gonzales*, 435 F.3d at 1181. Courts, doctors, and, in fact, the Government, all have found the statute susceptible to multiple interpretations, and its terms so ambiguous that the Ban fails to provide the specificity required of a criminal law under the U.S. Constitution.

The Federal Abortion Ban outlaws "partial-birth abortions," 18 U.S.C. § 153(a), a term with no medical or legal significance. *Planned Parenthood Fed'n of Am.* v. *Gonzales*, 435 F.3d at 1181; *Planned Parenthood of Cent. N.J.* v. *Farmer*, 220 F.3d 127, 136 (3d Cir. 2000); *Planned Parenthood of Greater Iowa, Inc.* v. *Miller*, 30 F. Supp. 2d 1157, 1165 (S.D. Iowa 1998), *aff'd*, 195 F.3d 386 (8th Cir. 1999). The statute

purports to prohibit *all* abortions where the doctor "deliberately and intentionally vaginally delivers a living fetus" up until a point on the fetus "for the purpose of performing an *overt act* that the person knows will kill the partially delivered fetus" and "perform[s] the overt act, other than completion of delivery." 18 U.S.C. § 153(a). But, this definition fails to provide any clarity as to what procedures are prohibited, and thus fails constitutional due process requirements.

As the district court and the court of appeals unanimously held, the Federal Abortion Ban may be read to cover an innumerable amount of conduct and, therefore, is unconstitutionally vague. The Government erroneously argues that "overt act" is a "standard statutory term of art," that "when read in context . . . obviously refers to an act that is distinct from the act of partial delivery." (Pet. Br. at 38-39.) As many doctors testified below, an "overt act" could "comprise many acts, performed not only in the process of an intact D&E, but in the course of a D&E by disarticulation (a non-intact D&E) or induction as well, including disarticulation of the calvarium, cutting the umbilical cord, or compressing or decompressing the skull or abdomen or other fetal part that is obstructing completion of the uterine evacuation." *Planned Parenthood Fed'n of Am.* v. *Ashcroft*, 320 F. Supp. 2d at 978. Moreover, the phrase "other than the completion of delivery" does not provide the context necessary to cure the statute of its vagueness. It is unclear on its face what procedures "complete a delivery." And, the term "living fetus" only contributes to the statute's vagueness, as the term broadly applies prior to viability, and the "overt act" prohibited thus could take place during any number of medical procedures.

Contrary to the Government's assertions, the Ban's operational provisions cannot be read to render clear guidance about which procedures are prohibited. (Pet. Br. at 37.)

Tellingly, the Government itself cannot agree on one construction and instead has defined the banned procedure in varying ways. *Compare Planned Parenthood Fed'n of Am.* v. *Ashcroft*, 320 F. Supp. 2d at 969 *with* Pet. Br. at 33. In the lower courts, the Government's position "[was] simply that . . . the Act is not vague and should be interpreted to apply only to intact D&E abortions—not to D&Es by disarticulation, inductions, or other abortion procedures." *Planned Parenthood Fed'n of America* v. *Ashcroft*, 320 F. Supp. 2d at 969. In its brief before this Court, however, the Government now contends that an abortion by dismemberment beyond a specified anatomical landmark—as set by Congress not physicians—would constitute "an especially gruesome form of the partial-birth abortion procedure that the Act seeks to outlaw." (Pet. Br. at 33.) These contradictory positions confirm the vagueness of the statute and why it would be unconstitutional for prosecutors to penalize physicians under such an ambiguous law.

Furthermore, the Ban's specific provisions, such as the phrase "living fetus," are hopelessly vague as a legal proscription. *Planned Parenthood Fed'n of Am.* v. *Ashcroft*, 320 F. Supp. 2d at 1183-84. As many courts have recognized in considering similar language, "reasonable physicians differ as to the meaning of what is 'living.'" *Planned Parenthood of S. Ariz.* v. *Woods*, 982 F. Supp. 1369, 1379 (D. Ariz. 1997). Indeed, courts almost universally have found that the term "living fetus" is unconstitutionally vague. *See Farmer*, 220 F.3d at 136-37 (finding "living human fetus" to be vague); *Richmond Med. Ctr. for Women* v. *Gilmore*, 55 F. Supp. 2d 441, 496 (E.D. Va. 1999) (same), *aff'd*, 224 F.3d 337 (4th Cir. 2000) (on undue burden grounds); *A Choice for Women* v. *Butterworth*, 54 F. Supp. 2d 1148, 1158 (S.D. Fla. 1998) (same). It is unclear whether a "living fetus" must be intact, *Miller*, 30 F. Supp. 2d at 1165 ("[i]t is not clear whether 'living fetus' refers only to an intact fetus with a heartbeat or some other form

of 'life,' or to a disarticulated fetus with a heartbeat or some other sign of 'life'"), or whether "living" is defined by some other criterion, *compare Woods*, 982 F. Supp. at 1379 (questioning whether a "living fetus" is simply a collection of living cells) *with Planned Parenthood Fed'n of America* v. *Ashcroft*, 320 F. Supp. 2d at 971 (defining living fetus as "pulsing umbilical cord" or heartbeat). A physician or prosecutor could not possibly know whether a given "overt act" "kill"-ed the fetus under the Ban without having a clear definition of what made it "living." *See Richmond Med. Ctr. for Women*, 55 F. Supp. 2d at 496; *Woods*, 982 F. Supp. at 1379. For these reasons too, the statute is plainly unconstitutional.

Contrary to the Government's contention, the statute's scienter requirements do not remedy the vagueness and may even contribute to it. "A scienter requirement applied to an element that is itself vague does not cure the provision's overall vagueness." *Planned Parenthood Fed'n of Am.* v. *Gonzales*, 435 F.3d at 1184; *see also Miller*, 30 F. Supp. 2d at 1166. A physician may "knowingly" or "deliberately and intentionally" perform a given action and still not be certain whether he or she has violated the Ban. This renders the statute unconstitutional for several compelling reasons.

First, as the court of appeals noted but did not resolve, it is disputed whether the "deliberately and intentionally" requirement modifies only "vaginally delivers" or the entire subsection relating to placement of the fetus. *Planned Parenthood Fed'n of Am.* v. *Gonzales*, 435 F.3d at 1180 n.22. This distinction has real and substantial consequences for a physician because it is virtually impossible to know with precision where a fetus is located at any given point during a medical procedure that simply cannot be stopped once begun. *See, e.g.*, *Carhart* v. *Ashcroft*, 331 F. Supp. 2d at 860 (testimony of Dr. Knorr that the cervix and sometimes part or all of the

uterus extends outside the vagina in four to six percent of his second trimester abortion patients); *id.* at 989 (testimony of Dr. Hammond that the location of the cervix in relation to the vaginal opening sometimes "evolves during the course of the surgery" and as a result "in the reality of an operating room, it is hard to tell when the fetus is outside the woman's body"). When faced with potential criminal liability, physicians should know for certain whether they risk criminal sanctions for failing to adequately monitor a fetus' placement (even were such monitoring possible at the start of the procedure). The Ban fails to provide such notice.

Moreover, the statute itself does not resolve the issue of *when* a physician must form the requisite intent to violate the Ban. The Government seeks to evade this critical issue by arguing that the Ban "applies only where the person performing the abortion has the specific intent, at the outset of the procedure, to deliver the requisite portion of the fetus of the purpose of performing the lethal act." (Pet. Br. at 32.) The Government's position, however, finds no support in the statutory text. Contrary to the Government's contention, it is unclear from the statute whether the Ban applies only to a physician who formed the specific intent from the outset or also to a physician who "knows" that in the course of an otherwise legal abortion procedure complications may arise that unintentionally result in a procedure that meets the Ban's proscriptions. *See Carhart* v. *Ashcroft*, 331 F. Supp. 2d at 1039 ("[a]rguably, use of the word 'knows' dilutes the specific intent required by the use of the word 'purpose' in the same sentence"). A physician should not be required to make the untenable choice between criminal liability and patient health. The statute is unconstitutional.

B. The Life Exception to the Federal Abortion Ban Also Is Unconstitutionally Vague

Adding significantly to the vagueness of the Federal Abortion Ban is the severely limited and vague life exception. The Ban exempts from prosecution procedures that are "necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury . . . ." 18 U.S.C. §1531(a). Particularly given the absence of a health exception, the statute's narrow life exception does not properly inform the prosecutor when a "threat to health" becomes a "threat to life," and thus is constitutionally deficient.[4]

First and foremost, the life exception is vague as to what is "necessary to save the life" of a mother. The Ban's language thus forces doctors, prosecutors, and courts to determine on an ad hoc basis when a threat to health (which the statute, unconstitutionally, does not exempt) becomes a sufficient threat to life. Prosecutors and courts will be placed in the untenable position of second guessing a physician's best medical judgment. For example, when presented with a physician who performed a banned procedure and her patient lived, prosecutors and courts will be forced, after the fact, to determine whether there was a threat to the health of the patient or a threat to her

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[4] *Amici* believe that the Ban's lack of a health exception renders the statute unconstitutional. *Amici* submit that there simply is no legitimate reason not to include a health exception in a statute that addresses a medical procedure. In truth, by so narrowly restricting the life exception compounded with the vagueness in the life exception—Congress has created a greater risk to women's health and lives which this Court should not countenance.

life. It not only is unclear how prosecutors and courts should draw that line, but it is almost impossible to do so.[5]

This Court has long recognized the importance of allowing physicians to exercise their best medical judgment, unencumbered by fear of criminal prosecution. *See, e.g.*, *Doe* v. *Bolton*, 410 U.S. 179, 199 (1973) (holding that a physician's best judgment whether a there is a threat to the life or health of their patient "should be sufficient"); *see also United States* v. *Vuitch*, 402 U.S. 62, 70-71 (1971) ("It would be highly anomalous for a legislature to authorize abortions necessary for life or health and then to demand that a doctor, upon pain of one to ten years' imprisonment, bear the burden of proving that an abortion he performed fell within that category.").[6] The

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[5] Moreover, the statute is vague for the additional reason that the life exception lacks a mens rea requirement. The lack of a mens rea requirement renders the ban a strict liability statute, under which a doctor who performs a banned procedure, believing reasonably *and* in her best medical judgment that the procedure is necessary to save the life of her patient, may nonetheless be criminally liable if, in retrospect, a prosecutor determines that the doctor was wrong about the life saving need for the procedure. *But see Carhart* v. *Ashcroft*, 331 F. Supp. 2d at 1041-42 (accepting the Attorney General's concession that "necessary" in the exception should be interpreted to mean a physician is permitted to perform a banned procedure "when the physician, in his or her own professional judgment, believes a partial-birth abortion is necessary to save a woman's life"). As this Court has held, the lack of a mens rea requirement in an abortion statute only "exacerbates the uncertainty of the statute." *Colautti*, 439 U.S. at 401.

[6] The Court in *Vuitch* went on to note that "[p]lacing such a burden of proof on a doctor would be peculiarly inconsistent with society's notions of the responsibility of the medical profession. Generally, doctors are encouraged by society's expectations, by the strictures of malpractice law and by their own professional standards to give their patients such treatment as is necessary to preserve their health." 402 U.S. at 71. Similarly, it is traditionally the role of prosecutors to ensure that doctors are acting in the best interests of their patients' health. The Federal

patient's "right to receive medical care in accordance with her licensed physician's best judgment and the physician's right to administer it" are no less important in the abortion context. *Bolton*, 410 U.S. at 197; *see also Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 884 (1992).[7]

The Federal Abortion Ban impermissibly requires prosecutors to substitute their judgment for that of physicians, a role prosecutors generally do not play. As the Government elsewhere has recognized, "[m]edical professionals, not lawyers, are the key to quality care." U.S. Dep't Health & Human Servs., *Addressing the New Health Care Crisis: Reforming the Medical Litigation System To Improve the Quality of Health Care* 29 (2003). Indeed, the Ban not only would have prosecutors interfere with the relationship between a doctor and her patient, but it would have prosecutors *replace* physicians' judgments with their own. Prosecutors simply are not equipped—nor should they be expected—to make medical judgments. Empowering prosecutors to do so is particularly dangerous here, where the vague proscriptions of the statute permit discriminatory enforcement in a highly politicized environment. To best protect the public health, reliance must be placed in the licensed physician's medical judgment, and not in the prosecutor. *Dent* v. *State of W. Va.*, 129 U.S. 114, 122-23 (1889); *see also Bolton*, 410 U.S. at 200.

Abortion Ban, however, requires prosecutors to enforce a law that imposes criminal penalties on a doctor who performs the banned procedures when, in her best medical judgment, she believes it is necessary to protect her patient's health. Neither prosecutors nor physicians should be put in such an untenable position.

[7] This Court in *Casey* reaffirmed that the doctor-patient relationship is entitled to the same solicitude in the abortion context as in other contexts. *Casey*, 505 U.S. at 884.

C. The Federal Abortion Ban Undermines the Necessary Public Perception of the Fairness of the Criminal Justice System

It is a bedrock principle that for the criminal justice system to maintain its credibility the public must correctly perceive that prosecutors, jurors, and courts are independent, neutral actors and outside of politics. Yet, the Ban threatens this very principle amid a highly politicized environment.

1. Vague Laws Threaten the Well-Established Principle That Prosecutors Must Be Perceived as Independent

It is beyond question that prosecutors have an affirmative duty to act independently of politics or other factors.[8] Of equal importance is the public's perception of the prosecutor as an independent and unbiased actor in the criminal justice system. As stated in *Gentile* v. *State Bar of Nevada*, "[o]ur system grants prosecutors vast discretion at all stages of the criminal process," and, therefore, "[t]he public has an interest in its responsible exercise." 501 U.S. 1030, 1036 (1991) (citing *Morrison* v. *Olson*, 487 U.S. 654, 727-28 (1988)). Courts widely have noted that the public confidence in the neutrality and impartiality in the criminal justice system is crucial to the proper functioning of the system. *See, e.g.*, *Georgia* v. *McCollum*, 505 U.S. 42, 49 (1992) (stating that a prosecutor's discrimination undermines the public confidence in adjudication); *Lockhart* v. *McCree*, 476 U.S. 162, 174-75

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[8] *See Forrester* v. *White*, 484 U.S. at 223 ("objective and independent criteria . . . should guide [a prosecutor's] conduct"); *Malley* v. *Briggs*, 475 U.S. at 343 (stating that prosecutors should exercise "independent judgment"); *Burns* v. *Reed*, 500 U.S. 478, 485 (1991) ("[i]ndependence of judgment is required of prosecutors by the 'public trust'").

(1986) (recognizing that there is an important interest in "preserving 'public confidence in the fairness of the criminal justice system.'") (quoting *Taylor* v. *Louisiana*, 419 U.S. 522, 530-31 (1975)). *See also Holland* v. *Illinois*, 493 U.S. 474, 495 (1990) (upholding policies regarding the fair selection of juries in order to preserve public confidence in the impartiality of the criminal justice system) (quoting *Lockhart*, 476 U.S. at 174-75).

The Federal Abortion Ban—which neither provides warning to the public, nor clear direction to the prosecutor—creates the unmistakable presumption on behalf of the public that the prosecutor enforcing the law may be acting in an arbitrary or discriminatory manner. *See Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983) ("Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'") (quoting *Smith* v. *Goguen*, 415 U.S. 566, 575 (1974)). Because the Ban is subject to varying interpretations, and arose in a highly politicized environment, it creates this perception that it will be arbitrarily enforced. As a result, were the Ban to be upheld, the public's confidence in the independence of prosecutors will only be undermined, thereby jeopardizing the public's confidence in the system. Such a result is untenable.

2. The Politicized Nature of the Abortion Debate and This Ban in Particular Further Undermines the Perception of Prosecutors as Independent and Chills Doctors From Acting in the Best Interests of Their Patients

It is of particular importance to prosecutors that laws dealing with politically charged topics do not create the perception by the public that political inclinations, as opposed to justice, motivate the enforcement of the law. Laws created

amidst a melee of political crossfire in particular require specificity, which the Ban utterly lacks.

This Court has recognized that arbitrary enforcement of a statute, or the *perception* thereof, is particularly problematic when emotions run high or participants feel strongly about a controversial matter, *see Cox* v. *Louisiana*, 379 U.S. 536, 551, 557 (1965) (holding, in a racial protest case, that a vague and overbroad Louisiana breach of peace statute "would allow persons to be punished merely for peacefully expressing unpopular views"),[9] and also that the independence and neutrality of prosecutors are threatened when they are asked to enforce vague criminal laws regarding political issues. *See, e.g.*, *Smith*, 415 U.S. at 575 ("Statutory language of such a standardless sweep [in a flag misuse statute] allows policemen, prosecutors, and juries to pursue their personal predilections."); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 170 (1972) (holding that an unconstitutionally vague ordinance "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure") (internal quotations omitted).

It is undeniable that abortion is a highly controversial political issue. Indeed, "[t]he issue of abortion is one of the most contentious and controversial in contemporary American society." *Stenberg*, 530 U.S. at 947 (O'Connor, J., concurring). Accordingly, courts widely have recognized the particular dangers of vague and overbroad abortion laws. *See, e.g.*,

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[9] *See also Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972) ("government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views") (quoted in *Denver Area Educ. Telcomms. Consortium* v. *FCC*, 518 U.S. 727, 799 (1996) (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part)).

Women's Med. Ctr. of N.W. Houston v. *Bell*, 248 F.3d 411, 422 (5th Cir. 2001) ("Especially in the context of abortion, a constitutionally protected right that has been a traditional target of hostility, standardless laws and regulations such as these open the door to potentially arbitrary and discriminatory enforcement."); *Tucson Women's Clinic* v. *Eden*, 371 F.3d 1173, 1196 (9th Cir. 2004). In fact, courts to have considered the Federal Abortion Ban aptly have noted the highly politicized environment surrounding this law in particular.[10]

Highlighting the political nature of this statute is the fact that the Ban is unlike any other law in existence. *Amici* can find no other law in the United States Code that criminalizes a surgical procedure performed by a doctor and simultaneously lacks a health exception. The only other federal statute that even regulates a medical procedure is the Female Genital Mutilation Ban statute ("FGM statute"), 18 U.S.C. § 116 (1996), and that statute contains a health exception.[11] Moreover, the

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[10] The district court below noted that "[d]issenting legislators within Congress made the same observations" as many testifying physicians, that "the term 'partial-birth abortion' has little if any medical significance in and of itself" and "is a term invented for political purposes." *Planned Parenthood Fed'n of Am.* v. *Ashcroft*, 320 F. Supp. 2d at 977. The court of appeals later observed that many sponsors of the Act expressed the sentiment that a "partial victory [would be] worthless from a political standpoint" and that they would rather have no statute than a statute with a health exception. *Planned Parenthood Fed'n of Am., Inc.* v. *Gonzales*, 435 F.3d at 1187. The court further noted that the supporters of the bill were "congressional partisans" and that "[a]bortion is an issue that causes partisans on both sides to invoke strongly held fundamental principles and beliefs." *Id.*

[11] The FGM statute states that "whoever knowingly circumcises, excises, or infibulates [the genitals of a female] . . . shall be fined under this title or imprisoned not more than 5 years, or both." 18 U.S.C. § 116. A "surgical operation" would not violate the statute if it were "necessary to the health of the person on whom it is performed." *Id.*

Federal Abortion Ban serves neither state interest outlined by this Court in *Casey*. As stated in *Casey*, abortion regulations potentially serve "two relevant state interests: 'an interest in preserving and protecting the health of the pregnant woman' and an interest in 'protecting the potentiality of human life.'" *Casey*, 505 U.S. at 929 (quoting *Roe* v. *Wade*, 410 U.S. 113, 162 (1973)). The Ban, however, neglects the first state interest of protecting a woman's health because it lacks a health exception. And, like the Nebraska Abortion Ban struck down in *Stenberg*, the Federal Ban "does not directly further an interest 'in the potentiality of human life' by saving the fetus in question from destruction, as it regulates only a *method* of performing abortion." *Stenberg*, 530 U.S. at 930 (emphasis added).

Because the debate surrounding abortion has been politically charged, specificity in the statutory text is particularly important. The Ban lacks such specificity. Without it, prosecutors will suffer from the misperception that any effort to enforce the law, or not, is a politically motivated, biased act. For these reasons, the decision of the court of appeals below should be affirmed.

II.
THE FEDERAL ABORTION BAN ALSO IS UNCONSTITUTIONALLY OVERBROAD, FURTHER THREATENING THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

In addition to being unconstitutionally vague, the Federal Abortion Ban is overbroad because it includes within its scope protected activities. *See Nat'l Ass'n for the Advancement of Colored People* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 308-09 (1964). While even "[a] clear and precise enactment may . . . be 'overbroad' if in its reach it prohibits constitutionally protected conduct," *Grayned*, 408 U.S. at 114,

statutes that are vague increase the likelihood of overbreadth, *Vill. of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.6 (1982) ("[T]he vagueness of a law affects overbreadth analysis."). The Federal Abortion Ban suffers from this very overbreadth.[12]

A. The Federal Abortion Ban Is Unconstitutionally Overbroad Because it Criminalizes a Majority of Second Trimester Pre-Viability Abortion Procedures

Under this Court's precedent, a woman has a constitutional right to choose to terminate a previability pregnancy and neither the state nor Congress may impose an "undue burden" on that right. Laws that threaten this right and impose criminal and/or civil liability are overbroad and constitutionally impermissible. *See, e.g., Stenberg*, 530 U.S. at 938-46.

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[12] The Government erroneously contends that the "only way to reconcile" the court of appeals' finding that the Ban is both vague and overbroad is to conclude that the court "flouted its normal obligation" to construe the statute narrowly. (Pet. Br. at 37.) This Court has held on numerous occasions that statutes may be both vague and overbroad, *see, e.g., Gooding* v. *Wilson*, 405 U.S. 518, 519-20 (1972) (affirming district court holding that statute was vague and overbroad), and has in fact held that statutes that are vague are more likely to be susceptible to an overbreadth challenge, *Hoffman Estates*, 455 U.S. at 495 n.6 ("The Court has long recognized that ambiguous meanings cause citizens to steer far wider of the lawful zone . . . than if the boundaries of the forbidden areas were clearly marked") (internal quotations omitted). In this case in particular, the vagueness in the statute only contributes to its overbreadth. Since it is impossible to determine whether Congress' findings relating to the alleged health effects of the prohibited conduct actually apply to all of the conduct criminalized under the Federal Abortion Ban, the statute necessarily fails under *Stenberg* for lack of a health exception and is unconstitutionally overbroad.

This Court has already determined that laws seeking to ban abortion procedures without a health exception are unconstitutionally overbroad. There is no reason for the Court to revisit this precedent.[13] In *Stenberg*, the Court reaffirmed *Casey*, holding that a statute with the "purpose or effect" of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus is an undue burden. *Id.* at 921 (quoting *Casey*, 505 U.S. at 877). After analyzing Nebraska's "partial-birth abortion" ban, the Court in *Stenberg* found the ban unconstitutional because it applied to a broader range of procedures than intact D&E, and would, in practice, prohibit most second trimester abortions. *Stenberg*, 530 U.S. at 939. Specifically, Nebraska's ban did not "track the medical differences between D&E and D&X—though it would have been a simple matter, for example, to provide an exception for the performance of D&E and other abortion procedures." *Id.* Similarly, Nebraska's ban failed to distinguish between D&E procedures involving an intact versus a disarticulated fetus. *Id.* Concluding that the ban left doctors who perform constitutionally protected D&E procedures subject to a legitimate "fear [of] prosecution, conviction, and imprisonment," this Court found the ban unconstitutional. *Id.* at 945.

The Federal Abortion Ban suffers from the exact same overbreadth as was at issue in *Stenberg*. The Ninth Circuit correctly affirmed the district court's finding that "the Act's definition of 'partial-birth abortion' reached all D&E procedures

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[13] Indeed, *stare decisis* "commands judicial respect for . . . earlier decisions." *Randall* v. *Sorrell*, 126 S.Ct. 2479, 2498 (2006). As this Court has held, "the rule of law demands that adhereing to . . . prior case law be the norm. Departure from precedent is exceptional, and requires 'special justification.'" *Id.* (quoting *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984)).

as well as certain induction abortions" and that "the Act created a risk of criminal liability for virtually all abortions performed after the first trimester." *Planned Parenthood Fed'n of Am.* v. *Gonzales*, 435 F.3d at 1169; *see Planned Parenthood Fed'n of Am.* v. *Ashcroft*, 320 F. Supp. 2d at 973-74; *Carhart* v. *Ashcroft*, 331 F. Supp. 2d 805, 1031 (D. Neb. 2004).[14] As the court of appeals below, and every other court to consider the issue, has found, the Federal Abortion Ban, like the abortion ban in *Stenberg*, prohibits most second trimester abortions, and may also encompasses non-abortion medical procedures. *Planned Parenthood Fed'n of Am.* v. *Gonzales*, 435 F.3d at 1169, 1177; *Carhart* v. *Ashcroft*, 331 F. Supp. 2d at 1031; *Planned Parenthood Fed'n of Am.* v. *Ashcroft*, 320 F. Supp. 2d 957, 973-74 (N.D. Cal. 2004). It, accordingly, is unconstitutional.

The Ban's overbreadth is indeed substantial. As discussed above, the term "partial-birth abortion" is not a medically-recognized term and does not limit the scope of the Ban. *Planned Parenthood Fed'n of Am.* v. *Gonzales*, 435 F.3d at 1181; *Farmer*, 220 F.3d at 136; *Miller*, 30 F. Supp. 2d at 1165. And Congress' attempt at definition "could readily be applied to a range of methods of performing post-first trimester abortions." *Planned Parenthood Fed'n of Am.*, 435 F.3d at 1183.

The Government attempts to save the statute by arguing that the "overt act" requirement somehow limits the statute's

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[14] Because of the Ban's overbroad sweep, Congress' findings regarding the safety of the specific procedures that were intended to be criminalized by the Federal Abortion Ban do not apply to all of the procedures proscribed by the Ban. *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, § 2(14), 117 Stat. 1201, 1204-06 (2003). Whatever the merits of Congress' findings, they do not apply to non-intact D&Es or to induction abortions, which also are criminalized by the Ban.

scope to intact D&E procedures. Not so. As noted above, the term "overt act" may encompass any number of procedures utilized in D&E procedures, inductions, and treatment of miscarriages. *See* IB *supra.* Indeed, the Government itself *concedes* that the term is *purposefully* broad. (Pet. Br. at 38.) Congress rejected during the debates any attempt to limit the Ban's scope to intact D&E and D&X.[15] Simply put, Congress cast too broad a net, outlawing procedures routinely used in more than 85% of post-first trimester abortions. *See Planned Parenthood Fed'n of Am.* v. *Gonzales*, 435 F.3d at 1166. For these reasons too, the Ban is unconstitutionally overbroad.[16]

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[15] As this Court held in *Stenberg*, "it would have been a simple matter . . . to provide an exception for the performance of D&E and other abortion procedures" or to use language tracking the medical differences between intact and non-intact D&Es. 530 U.S. 914, 939 (2000). In fact, the *Stenberg* Court set forth specific guidelines on how a legislature could distinguish intact D&E. Congress purposefully declined to heed this Court's advice and rejected amendments to narrow the statute's scope. *See Planned Parenthood Fed'n of Am.* v. *Ashcroft*, 320 F. Supp. 2d at 974. Instead, Congress drafted a statute that criminalizes a large majority of second trimester abortion procedures and thus encroaches on a woman's constitutional right to choose to have a previability abortion.

[16] The absence of any scienter element in the life exception further underscores the Ban's unconstitutional overbreadth. This Court repeatedly has insisted that life and health exceptions triggered by a necessity requirement must be made in the physician's "appropriate medical judgment." *Stenberg*, 530 U.S. at 937; *Casey*, 505 U.S. at 879; *see also Colautti*, 439 U.S. at 401. Here, however, the Ban's life exception is both overly narrow and vague. When coupled with the absence of a health exception, the effect of the statute is to place an undue burden on a woman's rights and, therefore, is unconstitutional.

B. Because the Federal Abortion Ban Is Vague and Overbroad, It Undermines the Traditional Role of Prosecutors to Enforce Laws That Protect the Health and Safety of the Public

It goes without saying that vague and overbroad laws chill constitutionally protected conduct. This chilling effect is particularly problematic, where, as here, the constitutionally protected conduct that the statute chills may be necessary to protect the health of a woman.

For prosecutors, this is troublesome for several reasons. First, the Ban contradicts the well settled role of prosecutors of protecting the public health by putting them in a position of chilling doctors' conduct. Second, it conflicts with the traditional role of prosecutors by forcing them to prosecute doctors who act in the best interests of their patients. When prosecutors are acting *against* the interests of patient health and seek to enforce a statute that permits arbitrary and discriminatory application, the public no doubt will construe a prosecutor's actions as politically motivated. This result undermines the entire criminal justice system and is simply untenable.

1. The Federal Abortion Ban Will Create a "Chilling Effect"

As noted, the substantial vagueness and overbreadth of the Federal Abortion Ban chills constitutionally protected activities. The Ban prohibits "nearly 85-95% of all second trimester abortions." *Planned Parenthood Fed'n of Am.* v. *Ashcroft*, 320 F. Supp. 2d at 974. Because of this overbreadth, the Federal Abortion Ban chills protected conduct, leading physicians to avoid performing medically necessary abortion procedures because they fear prosecution and imprisonment.

See Stenberg, 530 U.S. at 945-46 (noting that under an overbroad abortion ban, "[a]ll those who perform abortion procedures involving [the D&E] method must fear prosecution, conviction, and imprisonment").

The Ban's vagueness exacerbates this chilling effect. As explained, the vague proscriptions set forth in the Ban leave physicians in doubt of what is required of them to conform their conduct to the law. *See Carhart* v. *Ashcroft*, 331 F. Supp. 2d at 1032 ("Physician after physician expressed sincere doubt about how far the ban extended."); IA *supra*. Courts have noted that vague laws that impose civil liability on physicians for performing abortion procedures lead physicians to "steer far wider of the unlawful zone" than if the statutes were more precise in their scope. *Hoffman Estates*, 455 U.S. at 495 n.6.

The *criminal* liability established by the Federal Abortion Ban will have—and, in fact, has already begun to have—still more pronounced chilling effects. *See, e.g.*, *Planned Parenthood Fed'n of Am.* v. *Ashcroft*, 320 F. Supp. 2d at 974. Indeed, "[a] majority of the physicians who testified noted that because they fear prosecution, conviction, and imprisonment, the wide net cast by the Act could have and has already had the effect of impacting all previability second trimester abortion services that they provide to their patients." *Planned Parenthood Fed'n of Am.* v. *Ashcroft*, 320 F. Supp. 2d at 974 (internal quotations omitted); *see also Planned Parenthood Fed'n of Am.* v. *Gonzales*, 435 F.3d at 1179 (noting the "chilling effect on doctors' willingness to perform previability post-first trimester abortions").

The chilling of doctors who perform abortions harms not only women seeking abortions, but all women in need of reproductive health care.

2. Enforcing the Federal Abortion Ban Is Contrary to the Well-Settled Role of Prosecutors in Enforcing Laws to Protect the Health and Safety of Citizens

"[T]his Court has made clear that a State may promote but not endanger a woman's health when it regulates the methods of abortion." *Stenberg*, 530 U.S. at 931 (citing *Thornburgh* v. *Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 768-69 (1986)); *Colautti*, 439 U.S. at 400; *Planned Parenthood of Cent. Missouri* v. *Danforth*, 428 U.S. 52, 76-79 (1976); *Bolton*, 410 U.S. at 197; *see also Casey*, 505 U.S. at 879 (holding that the state may not proscribe abortion "'where it is necessary, in appropriate medical judgment, for the preservation of the life *or health* of the mother'") (quoting *Roe*, 410 U.S. at 164-65 (emphasis added)).

Though numerous Senators and Representatives warned that the Federal Abortion Ban would be unconstitutional without a health exception, Congress deliberately chose not to include such an exception. *See Planned Parenthood Fed'n of Am.* v. *Gonzales*, 435 F.3d at 1185-86 & nn.26-28. As every court to consider the Ban has found, substantial medical authority supports the proposition that prohibiting intact D&Es could endanger women's health. *Nat'l Abortion Fed'n* v. *Gonzales*, 437 F.3d 278, 285 (2d Cir. 2006); *Planned Parenthood Fed'n of Am.* v. *Gonzales*, 435 F.3d at 1174-76; *Carhart* v. *Gonzales*, 413 F.3d 791, 802 (8th Cir. 2005); *Carhart* v. *Ashcroft*, 331 F. Supp. 2d at 1017; *Nat'l Abortion Fed'n* v. *Ashcroft*, 330 F. Supp. 2d 436, 489 (S.D.N.Y. 2004); *Planned Parenthood Fed'n of Am.* v. *Ashcroft*, 320 F. Supp. 2d at 1033; *see also Stenberg*, 530 U.S. at 932 ("[S]ignificant medical authority supports the proposition that in some circumstances, D&X would be the safest procedure."); *id.* at 937 ("[U]ncertainty means a significant likelihood that those who believe that D&X is a safer abortion

method in certain circumstances may turn out to be right. If so, then the absence of a health exception will place women at an unnecessary risk of tragic health consequences."). Indeed, doctors testified below that intact D&E may in fact be the *best practice* for many physicians. *Planned Parenthood Fed'n of America* v. *Gonzales*, 320 F. Supp. 2d at 1001.

Because the Ban does not contain a health exception, it prohibits doctors from performing a medical procedure that they may believe in good faith is necessary to preserve the health of their patients.[17] Enforcing this Ban—and prosecuting a physician for acting to safeguard the health of her patient—would contradict the professional obligations of prosecutors dedicated to protecting the public health and welfare. As a result, doctors and women undoubtedly will fear that "overly zealous prosecutors [would be] emboldened to take improper advantage." *Carhart* v. *Ashcroft*, 331 F. Supp. 2d at 1040. Thus, the mere threat of prosecution erodes both women's reproductive rights and the valued role of prosecutors as neutral and independent law-enforcers. The danger of such a result is obvious.

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[17] This brief does not address whether deference is due Congress' "findings." Quite simply, the Ban prohibits a doctor from performing a procedure that could preserve the health of her patient. If, as Congress found, the Ban were never necessary to preserve the health of a patient, there would be no harm in including an exception for the potential circumstance where that were the case. On the other hand, if Congress' "findings" are wrong, and the prohibited procedures are necessary to preserve a woman's health, enforcing this Ban endangers that woman's health.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that the Court should affirm the decisions below.

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